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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 420.

FRED LEE RICE, FRANK RUTLEDGE AND THOMAS JONES

vs.

JOHN C. AMES, MARSHAL OF THE NORTHERN DISTRICT OF THE STATE OF ILLINOIS.

Appeal from the District Court in and for the Northern District of the State of Illinois, Northern Division thereof.

BRIEF OF APPELLANTS IN ANSWER TO BRIEF OF APPELLEE ON MOTION TO DISMISS OR AFFIRM OR ADVANCE THE CAUSE.

S. H. TRUDE,
ATTORNEY FOR APPELLANTS.

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JOHN C. AMES, MARSHAL OF THE NORTHERN DISTRICT OF THE STATE OF ILLINOIS.

Appeal from the District Court in and for the Northern District of the State of Illinois, Northern Division thereof.

Brief of Appellants in answer to Brief of Appellee on motion to dismiss or affirm or advance the cause.

MAY IT PLEASE THE COURT:

The appellants were arrested in the city of Chicago by the police on June 1, 1900, without any process whatever, and were told that they were wanted in Canada. (Rec., 2.) On June 2, 1900, Police Officer Clifton R. Wooldridge, of Chicago, made a complaint on information and belief, which was viod (Rec., 21), before U. S. Commissioner Mark A. Foote, who issued a warrant. The appellants were then taken by John C. Ames, U. S. marshal, appellee, out of the custody of the police and brought before said commissioner; thereupon the police asked that the cause be continued to June 4th. (Rec., 3.)

After the appellants were committed to jail, Police Officer Alfred Cuddy, of Toronto, lodged an additional affidavit with the commissioner (Rec., 25), which was also void for insufficiency. (Rec., 21, 22.) On June 4, 1900, another complaint was lodged before said commissioner by Arthur Cuddy, a police officer of Canada (Rec., 3), which complaint was also void and conferred no jurisdiction upon the commissioner (Rec., 25, 26); thereupon the appellants moved to dismiss said proceedings for want of jurisdiction in the commissioner (Rec., 3, 31), and thereupon the cause was continued to June 14th on motion of Arthur Cuddy, the complainant. On June 14th appellants were brought into court and a new complaint by William Greer was lodged with the commissioner. The appellants moved the commissioner to require the Canadian government to return to them the money which was taken from them at the time of their arrest, and for an order that such funds be placed in court, which was overruled. Appellants also moved to see the depositions from Canada which were then in court, and motion denied (Rec., 31), and that time be given appellants to examine the complaint of William Greer then filed (Rec., 42); whereupon said cause was continued to June 25, 1900. On June 25, 1900, appellants moved for a discharge on the ground that the complaints were void and conferred no jurisdiction, and especially on the ground that the commissioner had lost all possible jurisdiction by continuing the cause for eleven days, contrary to Section 6 of the Treaty with Great Britain proclaimed March 25, 1900, and in violation of the Statutes of the United States and the Laws of Illinois governing proceedings in extraditional cases. (Rec., 4, 5, 6, 42.)

Depositions offered in evidence and adjournment taken to June 26th and further evidence heard, and again continued to the 27th and further evidence heard; whereupon appellants moved the commissioner to discharge the defendants for want of jurisdiction; motion denied and cause continued to June 28. (Rec., 44.) June 28th appellants moved for discharge for want of jurisdiction and insufficiency of the evidence; motion overruled, and Thomas Jones and Frank Rutledge told the commissioner they would offer no evidence, and denied authority in the commissioner to proceed further. (Rec., 6, 44.) Thereupon proceedings were taken by said commissioner under advisement to July 6, 1900. (Rec., 6, 44.) July 6th counsel for the prosecution being absent from Chicago, further proceedings were adjourned to July 10th, and then some evidence was introduced as to Fred Lee Rice only, and appellants were all held to await the action of the proper authority in the matter. On July 11th appellants filed a petition for a writ of *habeas corpus* under oath, showing that they were restrained of their liberty by the appellee and confined in the Cook county jail, and were imprisoned and held in custody under the color and authority of the Constitution and Statutes of the United States relating to the return of fugitives from justice; that their imprisonment was illegal and in violation of the Constitution and laws of the United States for reasons which then followed. (Rec., 2.) Said petition contained a complete history of the proceedings from the time of appellants' arrest until the time of filing the petition, together with a copy of Section 6 of the Treaty of 1889 and the laws that appellants contended should have been followed. (Rec., 2, 4, 5.) A copy of the *mittimus* was attached to said peti-

tion. (Rec., 7, 8, 9.) Writ of *habeas corpus* issued and made returnable on July 14th. By stipulation in open court at the time of filing the petition the parties hereto agreed that the dockets, complaints, warrants, evidence and all the transactions and proceedings and papers before Mark A. Foote, commissioner, were to be produced in court on the hearing without a *certiorari*. (Rec., 20.) Amended petition, under oath, filed July 14th, alleges that Section 5270 of Title 66 of the Revised Statutes of the United States is unconstitutional in that it authorized the District Court to appoint an inferior court for the purpose of extradition purposes; that said commissioner exercised judicial powers contrary to Section 1, Article 3 of the Constitution of the United States (Rec., 15); that the appellants on June 4th applied to the commissioner to be admitted to bail and that bail was not at any time granted them. (Rec., 16.) On the return to the writ, July 14th, it was then stipulated between the appellants and appellee that all formal and further joining of issues be waived and that the hearing proceed upon the petition for writ of *habeas corpus*, the amended petition thereto, the writ of *habeas corpus* and the return thereto, papers, documents and evidence before said commissioner embraced in the stipulation of July 11th. (Rec., 20.) Hearing was then had, and the court certified in the bill of exceptions that he thereupon considered all the material allegations and all the points raised on said petition and amendment thereto, and being fully advised in the premises, denied the application for discharge, dismissed the petition and remanded appellants into the custody of appellee (Rec., 16); to which ruling of the court the petitioners herein then and there duly excepted. (Rec., 45.)

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Appellants filed their assignment of errors and prayed an appeal, which was allowed, and the District Court, under Rule 36 of this court, granted a supersedeas and stay of proceedings, and directed the officer of this court, to wit: the appellee herein, in open court, not to deliver the appellants to the Canadian authorities, but to hold them to await the action of this Honorable court. (Rec., 18, 19.) Citation was issued and served on the appellee (Rec., 51), amount of the supersedeas bond fixed at $500, which bond was given and approved by the court. (Rec., 41-47.) By stipulation, in making up the transcript of the record for this court, the clerk omitted the depositions taken before examining magistrates in Canada and the oral testimony taken before Mark A. Foote and the assignment of error thereon.

And on the 29th day of August, after the appeal was perfected, the appellants moved the District Court, under Rules 34 and 36 of this court, that bail be fixed and that they be admitted to bail, which motion was overruled and excepted to (Rec., 48); and on the 8th day of August additional assignment of error filed by leave of court.

August 8, 1900, order extending time for filing record and bill of exceptions. (Rec., 19.)

August 29th bill of exceptions signed and filed. (Rec., 45.).

ASSIGNMENT OF ERRORS.

(Rec., 17, 18 and 48.)

That there is manifest error in this, to wit: Mark A. Foote, the United States commissioner and extradition commissioner, who heard the evidence and held your petitioners in said matter to await the action of the secretary of state, had no jurisdiction on June the 14th, A. D. 1900, to issue the warrant for their said commitment, dated that day, because the complaint of William Greer was on information and belief and not a sufficient complaint as required by Section 10 of the Treaty with Great Britain and Section 5270, Title 66, Revised Statutes of the United States.

There is also manifest error in this, to wit: that said Mark A. Foote lost all possible jurisdiction in the premises by continuing said proceedings on June 14, 1900, to June 25, 1900, for a period more than ten days; that said continuance was not in conformity to any law and contrary to and in violation of Section 6 of the Treaty with Great Britain proclaimed March 25, 1890, contrary to and in violation of the laws of the United States and of the laws of the State of Illinois regulating the mode of procedure of such examining magistrates in such cases made and provided.

There is also manifest error in this, to wit: that said Mark A. Foote had no jurisdiction in the premises, because Section 5270, Title 66, is unconstitutional (1), because it does not provide for any mode of procedure relat- commissioners appointed in extradition matters by the District Courts of the United States; (2) Section 5270,

ing to continuance, change of venue, bail, etc., before Title 66, is unconstitutional because Congress had no power to confer upon a district judge of the United power to create such inferior courts; (3) because said magistrate is exercising judicial power in the premises, and Congress has not created such court and established its jurisdiction, powers, etc.

There is also manifest error in this, to wit: that your petitioners were denied bail by the said Mark A. Foote.

There is also manifest error in this, to wit: that the finding and judgment of Christian C. Kohlsaat, judge of the District Court of the United States in and for the Northern District of Illinois, denied the application of your petitioners for discharge in said *habeas corpus* proceedings, which finding and judgment were excepted to by your petitioners at the time it was entered; whereas, by the law of the land, the said judgment ought to have discharged your petitioners and set them at liberty, and the said Fred Lee Rice, Frank Rutledge and Thomas Jones pray the judgment aforesaid may be reversed and annulled and that your petitioners may be set at liberty in this *habeas corpus* proceeding.

There is also manifest error in this, to wit: that the said Mark A. Foote took the matter under advisement on June 28, 1900, as to relators, Frank Rutledge and Thomas Jones, and ordered them into custody after they had then and there and at all times refused to offer any evidence on their part on the ground, which was repeatedly urged, that said commissioner had no jurisdiction; that any discretion which said Mark A. Foote could possibly have had relating to granting continuances for time to procure evidence and prepare for hearing ended when

no necessity for exercising such discretion any longer existed; that so many continuances on said complaints and so long confinement of the relators and such taking of the relators' cases under advisement was an absolute abuse of discretion.

I.

The only reason advanced by appellee in his brief why this appeal, which has been allowed and perfected in every detail, should be dismissed, is: "That there is no provision in the law in force when this appeal was prayed and allowed for appeal in this class of cases," and cites *Bucklin* v. *U. S.*, 159 U. S., 680, in support of his position, which he says is the only direct adjudication he has found.

The principle announced in the case of *Bucklin* v. *United States*, 159 U. S., 680, and chiefly relied upon by counsel for appellee on his motion to dismiss this appeal, in no way affects or has any application to the right of appeal in this case. Bucklin was sentenced to the penitentiary on a verdict finding him guilty of perjury, and the only way he could have that judgment reviewed was on a writ of error. He had no right to appeal before the taking effect of the judiciary act of March 3, 1891, and it was held that act did not give him a right of appeal which before that act he did not have; that his remedy was by writ of error as before.

Sec. 763 of the Habeas Corpus Act, Rev. Stat. U. S., which was in force before and at the time of the passage of the Judiciary Act of 1891, provided:

> "From the final decisions of any court, justice or judge inferior to the Circuit Court, upon an applica-

> tion for a writ of *habeas corpus* or upon such writ when issued, an appeal may be taken to the Circuit Court for the district in which the cause is heard. (1) In the case of any person alleged to be restrained of his liberty in violation of the constitution or of any law or treaty of the United States." * * *

Section 784, as amended in 1885, provided for an appeal from the final judgment of such Circuit Court to the Supreme Court.

By the 5th Section of the Judiciary Act of March 3, 1891, it was expressly provided:

> "That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts to the Supreme Court in the following cases:"

two of which cases so enumerated are as follows:

> "In any case that involves the construction or application of the Constitution of the United States."
>
> "In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question."

The Judiciary Act of March 3, 1891, did not cut off the right to appeal which then existed or change the form of reviewing the cause to a higher court from appeal to writ of error.

Bucklin v. *U. S.*, 159 U. S., 680.

The Act of 1891 simply changed the right of the relator or respondent in *habeas corpus* cases, if the facts came within any of the provisions enumerated in Sec. 5, to appeal direct to this court, instead of the Circuit Court, as was done *in re Lennon*, 150 U. S., 393.

Ornelius v. *Ruyz*, 161 U. S., 502.

The right to appeal was not repealed by that act. Section 14 of that act is:

> "And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding Sections 5 and 6 of this act are repealed."

The right to appeal, as it then existed, was not inconsistent with the provisions of the Act of March 3, 1891; it was the right to have the appeal taken to the Circuit Court that was cut off by that act and another court expressly substituted in place of the Circuit Court, to wit: the Supreme Court of the United States, if the construction of a treaty or the constitutionality of an act of Congress was involved.

In *Re* Lennon it was said, in passing on the words, "unless otherwise provided by law," in Section 6 of that act:

> "The words are manifestly inserted out of abundant caution, in order that any qualifications of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away, except when expressly so provided. Implied repeals were thereby intended to be guarded against."

On motion to dismiss the appeal, in *Shute* v. *Keyser*, 149 U. S., 651, which was an appeal from the Supreme Court of the Territory of Arizona to this court, on the ground that by reason of the Act of 1891 the appeal was improperly allowed, it was held: "There was no express repeal of the provisions of the prior acts regulating appeal or writs of error in such other cases from these courts to this."

> "There is nothing to indicate an intention that the judgments and decrees of the Supreme Courts of the Territories should not be susceptible of review in

> the class of cases in which there was no appeal or writ of error to the Circuit Court of Appeals. And the acts regulating appeals or writs of error to or from this court were not repealed except to the extent specified."

And the motion to dismiss was denied.

And a motion to dismiss was denied under similar facts in *Gunzales* v. *Cunningham,* 164 U. S., 619, which was a *habeas corpus* case, decided in 1896. It was there held that, where appeals would lie under acts of Congress allowing appeals in force at the time of the passage of the Act of 1891, the right of appeal was not affected by the Act of 1891.

In the case of *in re Lennon,* 150 U. S., p. 393, which was an appeal from the Circuit Court of the Northern District of Ohio in a *habeas corpus* case, this court, speaking through Chief Justice FULLER, said:

> "While the right of appeal from the judgment of Circuit Courts directly to this court in all cases is taken away by the Act of March 3, 1891, that right still exists in the cases designated in Section 5 of that act." (Citing:
>
> *Nishimura Ekin* v. *United States,* 142 U. S., 651.
>
> *Horner* v. *United States* (No. 2), 143 U. S., 570.

In the case of *Ornelas* v. *Ruyz,* 161 U. S., 502, which was an extradition proceeding and was an appeal from the decision of the judge in a District Court of the United States in the Western District of Texas, discharging the appellees therein from custody in an extradition proceeding, in which they were held by a commissioner of the Circuit Court on the complaint of the Mexican consul, the court said:

"As the construction of the treaty was drawn in question, the appeal was taken directly to this court, and the District Court rightly required petitioners, under Rule 34, to enter into recognizance to answer its judgment."

Carter v. *Roberts,* 177 U. S., 496.

Cincinnati, Hamilton, etc. v. *Thiebaud,* 177 U. S., 619.

Scott v. *Donald,* 165 U. S., 58.

The case of *Bryant* v. *United States,* 167 U. S., 104, was an appeal from the final order of the Southern District of the District of New York upon a writ of *habeas corpus* sued out by the appellant to obtain his release from the custody of the marshal of that district, who held him by a *mittimus* issued by a commissioner of a Circuit Court in an extradition proceeding.

Shute v. *Keyser,* 149 U. S., p. 651.

Cramer v. *Washington State,* 168 U. S., 127.

If Congress used the words appeals and writs of error advisedly in Section 5 of the Act of 1891, as counsel for appellee suggests in his brief, then it must be held that Congress did not intend to abolish the right to appeal as it then existed; otherwise Congress would have omitted from that act the words "appeals and said writs of error may be taken," etc., or, if Congress intended to limit appeals, would have done so by saying in what cases appeals might be taken.

It is manifest that if this appeal had been taken to the Circuit Court or Circuit Court of Appeals the motion to dismiss would be good.

Most of the courts have held that, independent of statutory provisions, a decision in a *habeas corpus* case

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is not of that final and conclusive character necessary to support a review by writ of error. (Encyc. Pl. & Pr., Vol. 9, foot p. 1072.) And, if appellants in this case had sued out a writ of error, a motion could have been made to dismiss it for that reason. (*Ex parte Siebold,* 100 U. S., 371.) If Congress had undertaken to pass an act designed especially to provide for allowing the appellants to appeal their case from the Northern District of Illinois to this court, they could not make the appellants' right to appeal any clearer or more positive than their right to appeal now in pursuance of Section 5 of March 3, 1891.

And, if counsel for appellee's contention is true, then this court is powerless to entertain an appeal from a judgment remanding the prisoners in any *habeas corpus* case —a power which was so admirably wielded by this court in the case of *In re Neagle,* 135 U. S., 1, discharging from custody Deputy United States Marshal David Neagle, whose brave act shielded the life of the late Mr. Justice Stephen J. Field, former justice of this court, then in the discharge of his duties, from the murderous assault made by David S. Terry.

In re Siebold, 100 U. S., 371.

II.

I enter upon the discussion of the other points raised in counsel for appellee's brief, namely, the motions to affirm under rule six and to advance the cause on the docket under protest; first, that counsel is asking this court, under the pretenses of a motion to dismiss the appeal, to consider, pass upon and determine on this motion, and at this time, all the points and issues involved, and errors

assigned, which this court has repeatedly held it will not do.

Second, since counsel has asked to have the judgment affirmed on the statement that this appeal and errors assigned are frivolous and taken for delay and has referred to the assignment of errors in a way which gives prominence in his brief to the minor assignments and scarcely touches on the important assignment of errors, it possibly calls upon the appellants to enter into a full discussion at this time of the merits of the case.

The complaint of Wm. Greer utterly fails to set forth a crime in the demanding country.

The averments in the complaint relating to shop breaking on May 22, 1900, are the only ones in the complaint by which any endeavor was made to show that the acts complained of were crimes and punishable by the laws in force in the Dominion of Canada and these averments are mere conclusions of the rankest form without the averment of any facts whatever and are therefore wholly fatal to confer jurisdiction. (Rec., 33.)

State v. *Swoop*, 72 Mo., 399.
Bundy v. *Hart*, 46 Mo., 460.
Ex parte Smith, 3rd McLean's Rep., 121.
People ex rel Lawrence, 56 N. Y., 182.
In re Hayward, 1 Sand Sup. Ct. (N. Y.) R., 701.
In re Fetter, 23 N. J. L., 311.

Shop-breaking was not an offense at common law. No common law burglary is alleged. The acts complained of on May 22 charge nothing more than a trespass.

The usual and customary words, such as *felonious*,

burglarious and *felonious intent,* are omitted and "did commit an indictable offense" without naming what offense was committed therein and then concluding "contrary to statute," etc., are wholly defective.

Whorton's Pl. & Pr., Sec. 265.
State v. *Swope,* 72 Mo., 401.

The first charge on information and belief in complaint of Wm. Greer (Rec., 33) and also the second and third charges are wholly insufficient to charge a common law larceny because no value is averred; the words "sum of money" and figures $55, $200, do not show that it was current or lawful money of the United States, what kind of money of what country is meant—this is fatal.

Brown v. *People,* 173 Ill., 34.
$380.50 in money held not sufficient, *Ib.*
Wharton Pl. & Pr., Secs. 213-218.
Reside v. *State,* 10 Tex. App., 675.

"A large sum of money, to wit: the sum of $1,100" was held fatal by the Supreme Court of N. Y. in 16 Hun., 476.

"The said sum of fifteen hundred dollars did steal, take and carry away contrary, etc.," held bad.

People v. *McDonald,* 48 Mich., 492.
State v. *Denton,* 74 Md., 517.

"One pound eleven shillings" held insufficient.

Rex v. *Furneaux, Russ, Ryan* (British Crown Cases), 334.
State v. *Thompson,* 42 Ark., 517.
King v. *Flowers,* 5 Barn. & Cress., 736.

"Sundry promissory notes for payment of money of value $80, the chattels of A," charges no larceny.

Stewart v. *Com.*, 4 Serg. & R. (Pa.), 194.
People v. *Williams*, 35 Cal., 671.
State v. *Hoke*, 84 Ind., 137.
State v. *Hinkley*, 4 Minn., 345.
State v. *Oakley*, 10 S. W. Rep., 17.
Rhodes v. *Com.*, 2 Duv. (Ky.), 159.
Kearney v. *State*, 48 Md., 16.
People v. *Ball*, 14 Cal., 101.

The allegation in the complaint regarding the shop breaking is *was* guilty and does not show which one of appellants is referred to.

This complaint of Wm. Greer does not charge that anything was *feloniously* done,—this is also fatal.

Scudder v. *State*, 62 Ind., 13.
Gregg v. *State*, 64 Ind., 223.
Ridgeway v. *State*, 41 Tex., 231.
Baker v. *Com.*, 2 Va. Cas., 122.

The omission of *felonious* reduces the act to trespass.

Savine v. *State*, 85 Ind., 576.

A complaint charging the larceny of coin must allege that it is current money of the U. S., or of some other country.

People v. *Ball*, 14 Cal., 101.
State v. *Parker*, 1 Haust Crim. C. (Del.), 9.
Lord v. *State*, 20 N. H., 404.
Leptwich v. *Com.*, 20 Gratt (Va.), 716.

Must allege also the value of the coin.

Boyle v. *State*, 37 Tex., 359.
Beery v. *U. S.*, 2 Cal., 186.

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The complaint does not charge a larceny at common law, because it does not aver a taking and carrying away.

Gregg v. *State*, 64 Ind., 223.
1 Hale P. C., 504, 508, 2 *id.*, 184.
Spittorf v. *State*, 108 Ind., 171.

A complaint under oath, as provided by the treaty, is wholly insufficient to confer jurisdiction unless all the essential elements and facts necessary to constitute the particular crime charged are set forth in the complaint.

In re Farez, 7 Blatchf., 35.
Ex parte Hart, 63 Fed. Rep., 259.
Ex parte Morgan, 20 Fed. Rep., 299.

"All legal intendments in a case of this kind are to avail the prisoner, *Id.*"

Ex parte Smith, 3d McLean, 121.
State v. *Richardson*, 34 Minn., 115.

In the case of *People, ex rel. Lawrence*, 56 N. York Rep., 183, the court, in passing upon the Act of Congress providing for extradition between the states, said:

> "The false pretenses are not set out. * * * In an indictment the false pretenses must be averred. * * * It cannot be held that any less degree of certainty is admissible in an affidavit * * * than in an indictment for the same offense. If any distinction exists in this respect the affidavit should be more full and specific. It is usually the *ex parte* statement of an accuser, while an indictment is by a body of men standing indifferent between the parties."

"The complaint must positively and explicitly state what the prisoner is called upon to answer."

Smith v. *State*, 21 Neb., 556.
U. S. v. *Tureaud*, 20 Fed. Rep., 623.
Lippman v. *People*, 175 Ill., 113.

Sec. 3 of Fugitive from Justice Act of Illinois, *supra*, is:

> "Upon complaint under oath, *setting forth the offense and such other matters as are necessary to bring the case within the provisions of law.*"

Sec. 348, Hurd's Rev. Stat. (Ill.), p. 627, as to complaints, is:

> "Upon complaint made to any judge or justice of the peace that any such criminal offense has been committed, he shall examine on oath the complainant, and any witness produced by him, shall reduce the complaint to writing and cause it to be subscribed and sworn to by the complainant; *which complaint shall contain a concise statement of the offense charged to have been committed.*"

And the Supreme Court of this state in construing that statute held that in order to confer jurisdiction the facts must be fully set out to show the crime charged.

Haush v. *People*, 75 Ill., 487.

So it will be observed that there is no legislation in Illinois regarding a complaint that makes it possible to confer jurisdiction by a complaint not good by the terms of the treaty.

Where an essential element necessary to charge an offense has been omitted in complaint it is a matter of substance; no jurisdiction is conferred upon the magistrate and such fatal defects can be availed of at any stage of this proceeding even in this court, if raised for the first time on appeal.

Donaldson v. *Hazen*, Hemp. (U. S.), 423.
Eilenberger v. *Nelson*, 64 Ill. App., 277.
Chicago & E. Ill. Ry. Co. v. *Hines, Admr.*, 132 Ill., 161.

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1 Chitty's Pl. (7th Am. Ed.), 722, 723.
Dillard v. *St. L. K. G. & N. R. R. Co.*, 58 Mo., 68.
Mathie v. *McIntosh*, 40 Wis., 120.
Riley v. *City of Lowell*, 117 Mass., 76.
Stearly's appeal, 3 Grant (Pa.), 270.
Doctor et al. v. *Hartman*, 74 Ind., 231.

The complaints being void the magistrate had no jurisdiction. Where the magistrate loses jurisdiction, his judgment is void and *habeas corpus* is the proper remedy to relieve from imprisonment thereunder.

Ex parte Siebold, 100 U. S., 371.

The complaints before Marke A. Foote were insufficient complaints under oath in that they were on information and belief and therefore void and gave said Marke A. Foote no jurisdiction in the extradition matter in which the appellants were held and deprived of their liberty.

Ex parte Lang, 6 Fed. Rep., 34.
Johnston v. *U. S.*, 87 Fed. Rep., 189.
Ex parte McCabe, 46 Fed. Rep., 363.
Lipman v. *People*, 175 Ill., 101.
State v. *Swope*, 72 Mo., 399.
In re Helbonn, 1st Parker Crim. Rep. (N. Y. S. C.), 436.
In re Kelly, 25 Fed. Rep., 268.

William Greer in the third paragraph of his complaint says "That he is informed and believes, etc.," and in the next to the last paragraph says he "is informed and believes."

When it is not clear what portion of a complaint is on

information and belief, and what, if any, is positively sworn to, all is on information and belief.

Siegmund v. *Ascher*, 37 Ill. App., 122.
Stirlen v. *Neustadt*, 36 Ill. App., 378.
The B. T. Co. v. *Balding Bros. & Co.*, 40 Ill. App., 378.
Commerce Vault v. *Hurd et al.*, 73 Ill. App., 107.
Chi. Ex. Co. v. *Ill. State B'd of Ed.*, 77 Ill. App., 350.

III.

The second assignment of error I most respectfully submit is of the most vital importance for several reasons.

The decision of this Honorable Court on the merits in this case will settle the questions of what statutes and mode of procedure extradition commissioners ought to follow in international extradition cases. No two commissioners can be found in this district who proceed alike in international extradition cases—some say continuances can be granted for longer periods than the state law allows—others say not—some refuse change of venues on the ground that Sec. 1014 of the U. S. Rev. Stat. does not apply—some grant changes of venue on the ground that they should proceed as examining magistrates in each state—some refuse bail, others grant it—some say when change of venue is granted the case should go to the next nearest justice as provided by our state law, others say the state law does not apply, etc.; and when counsel says this assignment is frivolous I do not believe he fully appreciates the importance of having these things settled.

The second assignment of errors does not attack the treaty on the ground that it is unconstitutional as counsel erroneously *asserts by his brief*, but calls for the construction of Sec. 6 of the treaty of 1889 in as positive and direct manner as it is possible to raise it.

The construction of that section has never been passed on in any court in this country or England, if it has I have been unable to find it.

Judge C. C. Kohlsaat of this district would not have granted a supersedeas herein and ordered the marshal of his court to hold the appellants to await the final orders of this court if he had thought that the questions were not submitted in good faith and of sufficient weight and importance to get the decision of this court thereon.

The said Marke A. Foote lost all possible jurisdiction in the extradition proceeding by continuing the said cause from June 14, 1900, to June 25, 1900, the same being a period of more than ten days, and every order entered in said proceeding thereafter was absolutely null and void and of no effect.

U. S. v. *Horton*, 2 Dill., 94.
Mahr v. *Young*, 13 Wis., 710.
Gamage v. *Law*, 2 Johns, 192.
Crichton v. *Beebe*, 7 Ill. App., 272.
The People v. *Jarrett*, 7 Ill. App., 566.
State v. *Swope*, 72 Mo., 399.
In re Thomas Kane, 10 N. Y. Leg. Obs., 129.
In re Thomas Kane, 14 How., 103.
In re MacDonald, 11 Blatch., 79.

Section 627 Revised Statutes of the United States is "commissioners of the Circuit Courts shall exercise the

powers, which are or may be expressly conferred upon commissioners of Circuit Courts."

The act abolishing Circuit Court Commissioners authorized U. S. Commissioners to be appointed by the District Courts with the same powers that Circuit Court Commissioners formerly held.

Section 1014 of the Revised Statutes of the United States provides: "That for any crime or offense against the United States the offender may, by any justice or judge of the United States or any commissioner of the Circuit Court to take bail, etc., * * * and *agreeably to the usual mode of process against offenders in such state* be arrested and imprisoned, etc., or bailed as the case may be.

Section 727 Revised Statutes of the United States provides that the commissioners of the Circuit Courts, etc., shall have authority to hold for security of the peace and good behavior in cases arising under the constitution and laws of the United States as may be exercised by any judge or justice of the peace of *respective states* in cases cognizable before them.

Article 10 of the Ashburton treaty with Great Britain of 1842 providing for the extradition of fugitives from justice provides, *that this shall only be done upon such evidence of criminalty as according to the laws of the place* where the fugitive or person so charged shall be found would justify his apprehension and commitment for trial if the crime or offense had there been committed and provides that a warrant may be issued by judges or other *magistrates.*

Section six of the treaty between the United States and Great Britain, proclaimed March 25, 1890, is:

"The extradition of fugitives under the provisions of this and of the said tenth article shall be carried out in the United States and Her Majesty's dominions respectively in *conformity to the laws regulating extradition for the time being in force in the surrendering state.*"

Section 67, Article 7 of Chapter 79, Revised Statutes of Illinois, governing continuances by justices of the peace and examining magistrates, in force July 1, 1872, is as follows:

"The justice before the commencement of the trial may continue a case *not exceeding ten days* at any one time on consent of the parties or on any good cause shown. Either party shall be entitled to such continuance if it shall appear upon his oath, or that of a credible witness, that he cannot safely go to trial on account of the absence of material testimony."

Section 3, Chapter 60, Revised Statutes of Illinois, called the Fugitive from Justice Act, which was enacted as auxiliary to the United States statutes on extradition between states, in force July 1, 1874, is as follows:

"When a person is found in this state, charged with an offense committed in another state or territory, and liable, by the constitution and laws of the United States, to be delivered over upon the demand of the executive of such other state or territory, any judge, justice of the peace or police magistrate may, upon complaint under oath, setting forth the offense, and such other matters as are necessary to bring the case within the provisions of law, issue a warrant to bring the person charged before the same or some other judge, justice of the peace or police magistrate within this state, *to answer to such complaint as in other cases.*"

It is also clear that as a U. S. commissioner Mark A. Foote could not have continued from June 14th to June 25th in the manner in which he did without losing jurisdiction either under Section 724 or 1014, Rev. St. U. S.

Sec. 5270 Rev. St. U. S., relating to international extradition, does not provide for any mode of procedure whatever except that a person charged may be brought before said commissioner to the end that evidence of criminalty may be heard and considered; and it is fair to presume that Congress at the time of the passage of said Section 5270 intended that commissioners appointed by the courts to act as extradition commissioners should proceed in accordance with the sections of the statutes governing U. S. commissioners. There can be no good reason advanced why they should not proceed directly in accordance with Sect. 724 or 1014 of U. S. Rev. S.

In re Mineau, 45 Fed. Rep., 189, which was a habeas corpus case in an extradition matter, it was held that under Sect. 727 of the Rev. St. of U. S. the commissioner was authorized to proceed and had power to arrest in order to carry out treaty obligations.

In the MacDonald case, 11 Blatchf., 79, it is said:

> "The practice in analogous cases in the state wherein the proceedings are conducted, is said, in one of the cases referred to to be a guide to the commissioner in the conduct of the investigation. If this be so then it is quite pertinent to refer to a familiar practice, sanctioned by the courts of this state where persons charged as fugitives are sought to be returned to another state."

In re MacDonald, 11 Blatchf., 79, and *In re* Ludwig, 32 Fed. Rep., 774, the question of discretion as to adjournments was discussed.

It will be noticed that the adjournments were not made contrary to and in violation of the statutes. The court *in re* MacDonald said no abuse of discretion appeared in that case, if it did relief could be had on habeas corpus.

Certainly no magistrate on the theory of discretion can continue causes contrary to all laws, including Section 6 of the treaty of 1899, which was not in force when these cases were decided.

"Discretion must be governed by rule, not by humor; it must not be arbitrary, vague or fanciful, but legal and regular."

Lord Mansfield in *Rex.* v. *Wilkes*, 4 Burr, 2539.
Tripp v. *Cook*, 26 Wend., 152.

In the case at bar there was an absolute abuse of discretion; the appellants were held without bail from June 2, on void complaints, over objection. The commissioner's docket shows (Rec., 25-31) that certain complaints having served their purpose were dismissed. The appellants did not ask that the case on June 14th be continued eleven days; they only asked for time to examine the last complaint and to defend against it. An hour or so would have been sufficient time. They asked to see the depositions of the Canadian Government, then in open court, and their request was denied. (Rec., 31.) After all the evidence was in on June 28, and two of the defendants absolutely refused to put in any evidence the commissioner took the case under advisement to July 6th, and again to July 10th.

The case at bar is essentially different in many respects from any case yet decided. No case is found that holds that a magistrate can take a case under advisement after the evidence is all in. The authorities are against it.

In re Calder, 2 Edm. Select Cases, 380.

The appointment of Mark A. Foote to act in extradition matters by the district judge (Rec., 44) did not make

him a District Court or confer upon him powers of a district judge or powers to proceed as a district judge might have proceeded or continue a cause for more than ten days as a district judge might have done.

Todd v. *U. S.*, 158 U. S., 278.

Under the proviso in Art. 10 of the treaty of 1842, that delivery "shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found will justify his apprehension and detention for trial. It is held that the extradition commissioner should proceed *according to the laws of the states.*

In re Farez, 7 Blatch. 360.
In re Kelly, 25 Fed., 268.
In re Ezeta et al, 62 Fed. Rep., 972;

Where it was held the law of the states must furnish the rule of procedure.

Benson v. *McMahon*, 127 U. S., 463.

If neither congress nor the treaty has provided for the procedure as to continuances by extradition commissioners, the Laws of Illinois which are not in conflict with the treaty or acts of Congress, but auxiliary thereto, and which provide a mode of procedure as to continuances must govern the extradition commissioner, and such laws are constitutional.

Ex P. Rosenblat, 51 Cal., 287.
Ex P. Cubreth, 49 Cal., 436.
Kurtz v. *State*, 22 Fla., 36.
Com. v. *Tracy*, 5 Met. (Mass.), 536.
Ex P. Romanes, 1 Utah, 23.
Hurd on Habeas Corpus, p. 636.
Moore v. *Illinois*, 14 How, 1314.

Mark A. Foote did not proceed in accordance with the laws of Illinois or any other law. His orders entered after June 14, 1900, were void under the decisions of this and other states as heretofore cited, and it does not matter which side asked for the continuance.

U. S. v. *Horton*, 2 Dill, 94.
State v. *Swope*, 72 Mo., 399.

It will be noticed:

> "The 6th section of the treaty of 1889, providing that extradition should be carried out in the U. S. and her Majesty's dominions respectively, in conformity with the laws regulating extradition proceedings for the time being in the surrendering state"

contains the word *laws* in the plural. If this section does not mean anything, why was it incorporated into the treaty? It is fair to presume that the parties who drafted the treaty were familiar with the auxiliary legislation enacted by nearly all, if not all, of the states of the Union providing for modes of procedure not covered by the acts of Congress, and that the signers of the treaty wanted the proceedings to be carried out in accordance with not only the laws regarding the sufficiency of the evidence, but laws regulating continuances and all laws of the surrendering state not inconsistent with the other provisions of the treaty or Art. 10 of 1842.

Counsel for appellee refers to *U. S.* v. *Rauscher*, 119 U. S., 412, and says the state cannot surrender fugitives to a foreign power. I agree with him and say the state of Illinois is not a party to this proceeding and is neither trying to surrender nor prevent the surrender of appellants, and further say that no extradition commissioner

can surrender any one except according to law. Nothing in the Illinois law regulating continuances is in conflict with the treaty or acts of congress.

The cases of *In re Henrich*, 5 Blatch., 414, and *In re* Farez, 7 Blatch., 35, do not sustain the position of appellee. It does not appear that the extradition commissioner in these cases continued the hearings in violation of the U. S. Rev. Statutes or the state statutes, and no objections were made on the hearings or later that the continuances in those cases were not according to law, and the questions of discretion in regard to the continuances were not discussed, and further, section 6 of the treaty of 1889 was not in force at the time those cases were decided.

IV.

The complaints, the commissioner's warrants and mittimuses contain various recitals that Mark A. Foote was specially appointed for the purpose of Title, 66 R. S. U. S., and I do not think he was entitled to act because of his special appointment for the reason that Section 5270 of Title 66 of the U. S. Statutes is in that respect unconstitutional, for the reasons set out in the assignment of errors on that point (Rec. 17). The tenth article of the treaty of 1842 provided for the issuance of warrants by judges or other *magistrates*.

The word "magistrates," used in connection with the words "warrants by judges" does not refer to magistrates in the broad sense of a civil officer, but in the sense of an inferior judicial officer, whose powers are created and regulated by law. In the absence of Sec. 5270 would any one say that under the Ashburton treaty Mark A.

Foote, as a private citizen, who held these appellants, was a magistrate empowered to issue warrants within the terms of that treaty?

Congress can establish an inferior tribunal, but it does not invest such inferior tribunal with judicial power.

Robertson v. *Baldwin,* 165 U. S., 275.

Congress did not say U. S. Commissioners authorized to issue warrants by law. If so, the act might be good.

Robertson v. *Baldwin,* supra.

But Sec. 5270 is "Commissioners *so authorized* to do by the courts." Commissioners cannot be authorized to issue warrants by the courts. Commissioners are appointed to office by the courts, but they derive their authority to issue warrants from the law, not from the courts. Sec. 5270 is unconstitutional in thus attempting to invest a person with powers to hear and determine the rights of the parties under the treaty and pass upon the sufficiency of the evidence and construe treaties and laws.

Am. & Enc., Vol. 6, foot pages 1048, 1053, 1054 and 1055.

People v. *Chase,* 165 Ill., 527.

U. S. v. *Rider,* 50 Fed. Rep., 406.

Campbell v. *State Union Bank,* 6 How. (Miss.), 659.

Election Supervisors Cases, 114, Mass., 247.

If Mark A. Foote, as U. S. Commissioner, was a magistrate without such special appointment, then he should have continued the case according to the state statutes on continuances.

Judge Nelson *In re* Kane 14, How. 103, said:

> "This would be so even without the treaty as the only mode of procedure in summary criminal proceedings is according to the practice before the state magistrates."

Counsel for appellee lays much stress upon the decision of *In re* Kane, 14 How., 103, as sustaining the special appointment. The Kane case was not decided by a majority of this court. The bench then consisted of eight members, and this court was then equally divided on the main questions then decided, and stood four to four.

The court there did not decide that a special appointment under Sec. 5270 was good. In that case it did not appear that the U. S. commissioner was specially appointed. The chief question in that case was whether the commissioners could act without being first authorized to do so by the president.

V.

No rule of law, or rule of this court has been cited by the appellee why this cause should be advanced on the docket. Sec. 3 of Rule 26 is that criminal cases may be advanced, but a habeas corpus proceeding is not a criminal case. If reasonable bail is now granted and appellants can give it, one of the reasons assigned by appellee, namely, that appellants may have to remain in jail a year or more, will no longer exist.

Respectfully submitted,

Attorney for Appellants.

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